BRETT ANDREW MACNAMARA

v.

KAM LEE KUAN

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[ORIGINATING SUMMONS NO: 24-2098-04]
8 JANUARY 2009

CIVIL PROCEDURE: *Execution - Stay - Application for stay pending appeal - Special circumstances - Nugatory test - Whether defendant prejudiced if stay not granted - Whether appeal if successful rendered nugatory - Whether justice tilted in favour of granting stay*

This was an application (encl. 22) by the defendant to stay the execution of the judgment entered against the defendant pending the disposal of the defendant's appeal to the Court of Appeal. The decision of the High Court had ordered the defendant to deliver vacant possession of a one storey bungalow ('the said property') to the plaintiff. In order for the court to consider the application for stay of execution pending the appeal to the Court of Appeal, the defendant must show (i) special circumstances which entitled the court to stay the execution and must relate to the enforcement of the judgment; (ii) whether the appeal to the Court of Appeal was frivolous or vexatious.

Held (allowing application for stay):

(1) The defendant would be prejudiced if stay was not granted as the plaintiff was entitled to enforce the judgment against the defendant. There was also every likelihood that the plaintiff who had obtained the judgment against the defendant, would dispose of the said property and thereafter he, being a foreign citizen/foreigner, may return to Australia. These facts could not be ruled out. In the event the defendant succeeded in the appeal to the Court of Appeal, the judgment may become a paper judgment and there was likelihood that the defendant may not be able to be restored to her original position or status or even enforce any judgment for damages if the said property was disposed of by the plaintiff. Therefore, these two factors have an important bearing and was related to the

A enforcement of judgment which arguably could be considered as special circumstances on the peculiar set of facts and circumstances in the instant case. (para 9)

(2) The appeal filed by the defendant to the Court of Appeal was B as a matter of right and was not frivolous or vexatious. As a general rule, the court would exercise its judicial discretion in such a way so as to prevent the appeal, if successful, from being nugatory or to frustrate the defendant from obtaining the fruits of the judgment of the appeal which would be a ground C to justify the *status quo* to be maintained. The appeal was against the whole of the decision of the High Court which clearly involved the interpretation of several statutory provisions which the defendant had claimed had been breached by the plaintiff. Further, another factor to be D considered was whether the subject matter of the property which the plaintiff had previously represented to be a matrimonial home where the beneficial interest of the defendant in the said property, would be at risk, if the defendant succeeded in the appeal and if the stay was not E granted. (para 11)

(3) The subject matter of the property was immoveable and not monetary and the principle of nugatory approach was a relevant factor to be taken into account. There was also a F likelihood of the defendant encountering great difficulty in obtaining back the said property if the same was transferred or disposed of, alternatively, the difficulty in obtaining the value of the property by way of damages as the plaintiff being a foreigner may not have sufficient funds or assets in this G jurisdiction to recover *in lieu* of the said property. In the circumstances, there were exceptional or special circumstances in the instant case where the scale of justice tilted in favour of granting the stay when considering the special circumstances coupled with the principles of nugatory approach which was H related to the enforcement of the judgment as found by this court. On the particular set of facts, background and circumstances, it was best and in the interest of justice to maintain the *status quo* pending the appeal. (paras 11, 12 & 13)

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(4) Pursuant to the order dated 5 August 2003, the court had on the application of the defendant and by consent ordered the plaintiff to be restrained or injuncted from entering into the said property until further order and this order still remained intact and had not been varied or set aside. The order in the instant case which had granted vacant possession to the plaintiff and which was the subject matter of the appeal to the Court of Appeal had not varied in any way or set aside the prohibitory injunction granted. (para 14)

(5) By seeking a stay of execution pending the appeal, the defendant was not depriving the plaintiff of the judgment which was given in his favour as the stay if granted would also not alter the position of the plaintiff to his detriment. On the contrary, if the stay of execution was not granted and the judgment was allowed to be enforced, it would be detrimental to the defendant and would cause irreparable damage to the defendant which would be far greater than any damage which the plaintiff might suffer, if the stay was granted as refusal of the stay rendered the appeal nugatory and would destroy the substratum of the appeal in the event the defendant succeeded in the appeal to the Court of Appeal. (para 15)

(6) The previous relationship between the defendant and the plaintiff and the previous claim by the plaintiff for the division of the said property as a matrimonial property when taken cumulatively could constitute special circumstances coupled with the principles of nugatory approach which was related to the enforcement of the judgment. In the circumstances and in accordance with reason and justice, the application for stay ought to be granted to the defendant pending the outcome of the appeal to the Court of Appeal. In the meantime, the defendant was ordered to pay a nominal rental for the said property to the plaintiff in the sum of RM300 per month commencing from the date of this order. (paras 16 & 18)

Case(s) referred to:

Credit Lyonnais v. SK Global Hong Kong Ltd [2003] HKEC 963 ***(refd)***

Diversey (Far East) Pte Ltd v. Serba Pakar Kimia Sdn Bhd [1992] 1 MLJ 775 ***(dist)***

Hock Thai Finance Corporation Berhad v. Lee Phet Soon [1994] 4 CLJ 687 HC ***(refd)***

Hoo Hua v. Lee Hin & Ors [1985] 1 CLJ 45; [1985] CLJ (Rep) 129 FC ***(refd)***

A *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC* ***(refd)***
Lim Joo Thong v. Koperasi Serbaguna Taiping Barat Bhd [1998] 1 CLJ 947 CA ***(refd)***
Madell v. Thomas & Co [1891] 1 QB 230 ***(refd)***
B *MCAT Gen Sdn Bhd v. Celcom (M) Bhd [2007] 8 MLJ 107* ***(refd)***
Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd [1941] 1 All ER 310 ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(dist)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
C *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2) [1976] 1 MLJ 131* ***(refd)***
RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No. 2) [2004] 2 MLJ 315 ***(refd)***
Sarwari Ainuddin v. Abdul Aziz Ainuddin [1999] 8 CLJ 534 HC ***(refd)***
D *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Anor [1997] 2 CLJ 299 CA* ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
The Annot Lyle [1886] 11 PD 114 ***(refd)***
Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd [2005] 7 CLJ 385 HC ***(refd)***

E *For the appellant/defendant - MS Raman; M/s Jaswant & Loh*
For the respondent/plaintiff - Tan Khay Boon; M/s KB Tan Kumar & Partners

Reported by Suhainah Wahiduddin

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JUDGMENT

VT Singham J:

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[1] This is an application (encl. 22) by the defendant to stay the execution of the judgment entered against the defendant by His Lordship Balia Yusuf J on 15 June 2007 as per the order dated 15 July 2007 (encl. 20) pending the disposal of the defendant's
H appeal to the Court of Appeal. His Lordship, Balia Yusuf J had upon hearing the plaintiff's application by way of originating summons and based on affidavit evidence allowed the plaintiff's claim on 15 July 2007 and granted the following orders:

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ADALAH DIPERINTAHKAN bahawa defendan adalah sebagai pemegang amanah kepada plaintiff berikutan satu suratikatan amanah bertarikh 5hb Mei 1999, bagi tanah yang dipegang di bawah HS(D) KA 1553/83 PT 46841 dalam Mukim Hulu Kinta Daerah Kinta, Perak beserta satu rumah bungalow setingkat yang dibina atasnya yang dikenali sebagai No.113, Jalan Chow Kai, Canning Garden, 31400 Ipoh, Perak (selepas ini dikenali sebagai hartanah tersebut)(hereinafter referred to as 'the said property').

DAN ADALAH JUGA DIPERINTAHKAN bahawa Defendan akan memberi milikan kosong hartanah tersebut kepada Plaintiff dalam masa tiga (3) bulan dari tarikh perintah ini dan Plaintif dibenar untuk memasuki dan menghuni hartanah tersebut selepas itu.

DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa kos permohonan ini dibayar oleh Defendan.

[2] The defendant being dissatisfied with the said decision given on 15 July 2007 had filed an appeal to the Court of Appeal.

[3] The grounds in support of this application (encl. 22) are as contained in the defendant's affidavit (encl. 23) and in the afidavit tambahan (encl. 25) and afidavit tambahan (encl. 29). Whereas the plaintiff has opposed the said application for the stay by filing an afidavit jawapan plaintiff (encl. 24), afidavit jawapan plaintif (no. 2) (encl. 28) and afidavit jawapan plaintif (no. 3) (encl. 30).

[4] Having gone through the application (encl. 22) which is supported by the affidavit of the defendant (encl. 23), affidavit in reply of the plaintiff (encl. 24), afidavit tambahan defendan (encl. 25), afidavit jawapan plaintif (no. 2) (encl. 28), afidavit tambahan defendan (encl. 29) and afidavit jawapan plaintif (no. 3) (encl. 30), submissions of both parties with the authorities and upon considering the cases referred to by this court, the decision of this court is as follows:

(1) In order for the court to consider the application for stay of execution pending the appeal to the Court of Appeal, it is trite that the defendant must show special circumstances which entitle the court to stay the execution and special circumstances must relate to the enforcement of the judgment. However, the court has an absolute and unfettered discretion to grant or refuse stay of execution of the judgment pending an appeal and may also upon terms grant the same.

Nevertheless, special circumstances must be deposed in an affidavit. The discretion to be exercised must be according to established judicial principles and within the confines of the law. However, the category of special circumstances is not closed and it will depend on the facts, background and circumstances of each case provided they have a bearing to the enforcement of the judgment.

(2) On the other hand, special circumstances must necessarily also include the principles of nugatory approach ie, whether there is a possibility that the appeal if it is decided in favour of the appellant-defendant, it would be rendered nugatory and frustrate the subject matter of the appeal and eventually extinguish the same if stay is not granted.

(3) On the other hand, merits on its own have not been and may not be sufficient to constitute special circumstances. Nevertheless, it may be taken into account with other facts such as the principles of nugatory approach in order to consider special circumstances. The principles of nugatory approach would be, if the application for stay is not allowed, it would destroy the substratum of the appeal, ie, in the instant case, if the said property being the subject matter of the appeal is transferred and sold, there is a high probability that the defendant cannot be restored or reinstated to her original status or position. In the instant case, it is admitted that the plaintiff is a foreigner, being an Australian citizen.

(4) The defendant's ground in respect of this application to stay in fact is directly related to the enforcement of the judgment. The defendant's fear of not being able to be restored or reinstated to her original status or position is not without any basis where the plaintiff has the right to recover the said property from the defendant pursuant to the judgment of His Lordship Balia Yusuf J by enforcing the same. In fact, the said property to date is registered in the defendant's name as the proprietress without any condition or conditions entered in the register or endorsed on the title and the title is indefeasible. (See s. 340 of the National Land Code).

[5] In any event, and in all fairness to the plaintiff's solicitor, and with regard to the decision of the originating summons (encl. 1), it is accepted that the defence raised by the defendant to the plaintiff's claim which includes the issue of illegality of the

trust deed are matters which relate to the merits of the defendant's appeal to the Court of Appeal and rightfully are matters for the determination of the Court of Appeal. Accordingly, the merits factor alone cannot be a decisive consideration or influence this court in deciding this application for stay. In this context, this court is mindful of the decision in *Diversey (Far East) Pte Ltd v. Serba Pakar Kimia Sdn Bhd* [1992] 1 MLJ 775 where the court had held that by not obtaining a written permission from the Controller of the Foreign Exchange as required by law is not a relevant factor for stay of execution as the money can be paid into court and not paid out contrary to the Act. Nevertheless, the facts in the instant case must be distinguished where the subject matter of the judgment which entitles the plaintiff to enforce the judgment is an immoveable property and not a monetary judgment. Further, the principles of nugatory approach and coupled with the fact that the plaintiff is not a citizen of this country and the likelihood of the plaintiff leaving permanently this country after having disposed of the said property must also be considered and this cannot be ruled out.

[6] On the other hand, merits may become relevant and could be considered when taking into account the strength of the merits of the appeal together with any special circumstances which exist and deposed to in the affidavit rendering it inexpedient to enforce the judgment before the outcome of the decision of the Court of Appeal. Nevertheless, it is important to stress again that merits of the appeal alone may not be sufficient on its own to constitute special circumstances. (See *Lim Joo Thong v. Koperasi Serbaguna Taiping Barat Bhd* [1998] 1 CLJ 947).

[7] At this stage, it is also important to distinguish the factual observation, being the 'fear of losing' the said property if stay is not granted as was observed in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 where Abdul Hamid Mohamed JCA (later Chief Justice of Malaysia) said at p. 407:

> The grounds relied on by the appellants are nothing more than 'fear of losing'; fear of *losing business,* fear of *losing customers,* fear of *losing suppliers,* fear of *losing goodwill,* fear of *not being able to collect its debts from third parties, in case the appellant company is wound up*. All that the applicant has to do to avoid such 'fears' is to settle the judgment debt. (emphasis added)

A It is also important to refer and distinguish the case of *Linotype-Hell Finance Ltd v. Baker* [1922] 1 WLR 321 where Straughton LJ said at p. 323:

> It seems to me that, *if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success that is a legitimate ground for granting a stay of execution.* (emphasis added).
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> I can see no ground for granting a stay of execution in respect of the claim for delivery up of the equipment. *It is not the property of the defendant*, and he *has no right or title to it*. In that respect the application is refused. (emphasis added).

In that case, the ground for refusing the stay was that, the property being the equipment was not the property of the D defendant and he had no right or title to it. Whereas in the instant case, the said property is registered in the name of the defendant who has a title to it and it is indefeasible unless then the title or interest in the said property shall be "defeasible by reason of any of the circumstances specified in sub-section (2)" of E s. 340 of the National Land Code which none has been shown to exist.

[8] Accordingly, this court finds that it becomes necessary on the facts, circumstances and background of this case to preserve F the *status quo* where there is a salvage factor involved. Therefore, it becomes necessary to deal with the situation and consider judiciously the application for stay. It is the considered view of this court that 'on the practical realities of the situation', it is inexpedient to allow the enforcement of the judgment before the G outcome of the decision of the Court of Appeal and this salvage factor could arguably be considered as one of the special circumstances coupled with the principles of nugatory approach. In *Re Rosengrens Ltd v. Safe Deposit Centres Ltd* (unreported, 19 July 1984, CA, Lexis Nexis) referred to in *Kosma Palm Oil Mill Sdn Bhd*, Dillon LJ said: H

> The most common special circumstance is, normally no doubt, that it would be doubtful whether, if the judgment was enforced, the defendant would get his money back if the appeal subsequently succeeded. But there are others as, for instance, *if there is a* I *likelihood that the money the subject of the judgment, if paid over, would go to a foreign jurisdiction where the defendant would have difficulty recovering it.* (emphasis by this court).

In *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1976] 1 MLJ 131, Lee Hun Hoe CJ (Borneo) said at p. 132:

> An appeal which would be nugatory if stay was refused by reason of the poverty of the respondent would be an example of special circumstances. See *Wilson v. Church (No 2)* [1879] 12 Ch D 454. Another example is that payment of a judgment debt would destroy the substratum of the appeal: *Metropolitan Real and General Property Trust Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310. However, an allegation on an appeal that there has been misdirection at the trial would not be sufficient to bring it within the special circumstances: *Monk v. Bartram* [1891] 1 QB 346. (emphasis added).

In *Metropolitan Real and General Property Trust. Ltd v. Slaters and Bodega Ltd* [1941] 1 All ER 310, the Court of Appeal at p. 310 said:

> … a stay of execution ought to be granted automatically, since, if the debtor is compelled to pay the sum recovered, the basis of the appeal is destroyed.

In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, Augustine Paul JCA (now FCJ) at p. 10 said:

> The general rule is that an appeal shall not operate as a stay of execution unless the Court so orders. Accordingly, as Brown J said in *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98; [1953] MLJ 116 while commenting on the discretion to grant a stay:
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> > But it is a clear principle that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it.

This is a re-statement of the common law rule explained in *The Annot Lyle* [1886] 11 PD 114 where Lord Esher MR said at p. 116:

> ... that an appeal shall be no stay of proceedings except the court may so order. We are asked to depart from this rule, although it is admitted that there are no special circumstances in this case which afford a ground for so doing. If in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the respondents are foreigners, or for

A other good reason, this must be shown by affidavit, and may form a ground for ordering a stay. To grant the present application would, in the absence of special circumstances, clearly be to act contrary to the provisions and intention of the Rules of Court.

B The need to establish the existence of special circumstances to enable the court to grant a stay of execution has been well established in this country.

It is therefore clear beyond doubt that there are many factors that C may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. *In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory* D *if stay was refused what it means is that a special circumstance has been established.* Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related (*See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd &* E *Anor* [1997] 2 CLJ 299) could have withstood scrutiny if it had merely referred to nugatoriness without rejecting special circumstances. *As nugatoriness is a species of special circumstances a mere reference to it is sufficient to convey the correct legal impression.* Any attempt to restrict the grant of a stay to nugatoriness, quite apart F from its impropriety, will severely restrict the grounds on which an applicant may rely. Learned counsel for the applicants is therefore wrong in submitting that the nugatory approach is not a matter for consideration in this case as what is relevant is only the special circumstances. He would have been correct if he had said that he G was not relying on nugatoriness but on some other species of special circumstances. (emphasis added)

The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. H *The reasons must relate to the enforcement of the judgment.* They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). (emphasis added).

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In *Hoo Hua v. Lee Hin & Ors* [1985] 1 CLJ 45; [1985] CLJ (Rep) 129, the respondent had obtained an order from the Magistrate's Court for vacant possession of a certain portion of a rent controlled premises by consent on 12 January 1982 against the appellant. Subsequently, on 24 September 1983, the respondent applied to the Magistrate's Court for leave to issue writ of possession to execute the judgment. The appellant applied for a stay of execution of the writ of possession on 2 November 1983. The learned Magistrate allowed the respondent's application for leave to issue writ of possession and refused the application for the stay of the writ. The appellant appealed to High Court against the decision of the learned Magistrate and in addition, she also applied to the High Court by an *ex parte* originating motion to stay the writ. The learned judge of the High Court who heard the originating motion refused the application and gave no reason for so doing. The appellant appealed further to the Federal Court against the decision of the High Court.

In dismissing the appeal, the Federal Court *observed that the appellant had already vacated the said premises. Therefore, the order for stay of execution was completely academic* and should the appellant succeed in the appeal, she could always be restored or entitled to damages.

Following the observation of the Federal Court in that case, it can be derived that had the appellant in that case not vacated the premises, there was a high probability that the Federal Court may have allowed the appeal in favour of the appellant as the stay would not become completely academic.

[9] By comparison and following the observation of the Federal Court in *Hoo Hua v. Lee Hin & Ors*, it is the considered view of this court, that, on the facts, circumstances and the background in the instant case, the defendant would be prejudiced if stay is not granted as the plaintiff is entitled to enforce the judgment against the defendant. There is also every likelihood that the plaintiff who had obtained the judgment against the defendant, would dispose of the said property and thereafter he may very well return to Australia, and these facts cannot be ruled out. Consequently, and in the event, the defendant succeeds in the appeal to the Court of Appeal, the judgment may become a paper judgment and there is likelihood that the defendant may not be able to be restored to her original position or status or even

enforce any judgment for damages if the said property is disposed of by the plaintiff. Therefore, these two factors have an important bearing and is related to the enforcement of judgment which arguably could be considered as special circumstances on the peculiar set of facts and circumstances in the instant case and taking into account the principles of nugatory approach.

In *Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd* [2005] 7 CLJ 385, His Lordship Abdul Malik Ishak J (as he then was) at p. 390 said:

> The court has an absolute and unfettered discretion as to granting or refusing a stay and it will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on an affidavit. *The justice of the case on stay is usually arrived at by striking a judicious and equitable balance between the principle that the successful party in the litigation ought be allowed to reap the fruits of his litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. Yet, it must always be borne in mind that a successful party in litigation has acquired a vested interest in the outcome of the case whereas the other party who appeals only has an interest contingent upon a successful outcome of his appeal*. And, it is primarily for this reason and the implied caveat that the courts should discourage parties who lose their cases upon merits, from wrenching the fruits of litigation from the successful parties – by keeping the litigation alive through spurious appeals without any real prospect of success and simply in the hope of gaining some respite against immediate execution upon the judgment, that the courts have been and are only moved to grant such a stay upon a set of certain requirements which, for want of a more appropriate term, the courts have been driven to use, quite rightly, the oft-quoted expression "special circumstances". Now, the term "special circumstances" is a term to denote a combination of certain determining factors that are usually demonstrated by affidavit evidence in order to persuade the court that it is a just and an appropriate case to grant a stay in the circumstances. (emphasis added).

In *Sarwari Ainuddin v. Abdul Aziz Ainuddin* [1999] 8 CLJ 534, Mahadev Shankar J (as he then was) at p. 539 said:

This discretion must be exercised within the parameters. Subject to that limitation every decision on stay of execution being an exercise of judicial discretion can only be a decision on its own facts, and cannot be treated as judicial precedent and binding. (emphasis added).

A word or two as to what is nugatory is not out of place. According to The New Shorter Oxford Dictionary it means "Trifling, of no value or importance, worthless, not valid, inoperative, useless, futile".

On the other side of the scales is the concept of not depriving a successful party of the fruits of his litigation. The purpose of the court order is to put those fruits into the plaintiff's mouth. Who is the defendant whom the court has found liable, to say that she should not be allowed to chew them.

In *Hock Thai Finance Corporation Berhad v. Lee Phet Boon* [1994] 4 CLJ 687, Abdul Kadir Sulaiman J (as he then was) at p. 691 said:

After the delivery of the decision in chambers of the plaintiff, the learned counsel for the defendant *by an oral application applied for a stay of execution of this decision pending appeal on the ground that if the stay is not granted irreparable damage would be caused to the defendant and his family. It is also contended that the matter is subjudice pending the two appeals mentioned earlier by the counsel. This application for stay was strenuously objected to by the learned counsel for the plaintiff on the ground that there is no special circumstances which would justify the stay.*

According to *Leong Poh Shee v. Ng Kat Chong* [1965] 1 LNS 90, although the Court has an unqualified discretion to grant a stay of execution it has never been the practice to do so unless it is supported by an affidavit of special circumstances. *Being an oral application, there is no affidavit in this case.* However, if I were to accept the submissions of the learned counsel for the defendant *in lieu*, the issue is whether the alleged irreparable damage to be caused to the defendant and his family would constitute special circumstances. In *Leong Poh Shee*'s case, *supra,* the learned Judge at page 86 has this to say about the special circumstances, with which I agree and adopt:

Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

> The consequence upon the transfer of the land to the successful bidder which results in the loss of the title of the defendant thereby causing the inconvenience to the defendant and his family is common and usual, in the context of the meaning to be given to the phrase "special circumstances" as mentioned, above: Therefore, it is nothing distinctive or out of the way and as such, in my view, would not by itself constitute special circumstances to persuade the court to stay the execution. On the issue of subjudice, for the reasons given earlier, the submissions do not appear to be attractive at all. The circumstances, the application for stay is hereby disallowed. (emphasis added).

In *Hock Thai Finance Corporation Berhad*'s case, there was no written application or an affidavit and the defendant had merely made an oral application without any affidavit in support and that was one of the reasons why the court did not consider granting a stay of execution pending appeal. Whereas, in the instant case, there is a proper and formal application which is supported by an affidavit for the stay.

In *RHB Sakura Merchant Bankers Bhd v. Tan Sri Dato' Ting Pek Khiing (No. 2)* [2004] 2 MLJ 315, His Lordship Abdul Malik Ishak J (as he then was) at p. 318 said:

> Factually speaking, cases like *Kerajaan Malaysia v. Dato' Hj Ghani Gilong (supra)* and *Tneoh Hong Seng @ Teoh Hong Seng v. Dayani Sdn. Bhd. (supra)* are distinguishable from that of the present case. In those two cases, there were no formal applications for a stay nor were there affidavits filed in support of the stay. Here, there was an application by way of a summons in chambers as reflected in encl. 17 for a stay accompanied by the necessary affidavit in support. (emphasis added).

> To date, the plaintiff has failed to show or prove that it will be prejudiced if the defendants' application for a stay would be allowed. There was nothing to show that even if the plaintiff would be prejudiced, it cannot be compensated by costs. It must be borne in mind that the summary judgment carries with it an element of interest and if the defendants fail in their appeal to the Court of Appeal, the plaintiff would certainly obtain the judgment sum together with interest payable thereto. (emphasis added).

In *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors (supra)*, VC George J (as he then was) allowed the application for the stay of execution and his Lordship had this to say (see the headnotes at p. 377 of the report):

(1) *in respect of applications for stay pending appeal, a distinction has to be drawn between a matter that was decided upon after full trial and enquiry and one summarily arrived at by a Senior Assistant Registrar. In the former case the general rule no doubt continues to be that special circumstances have to be shown (there could no doubt be exceptions to the general rule). But in the latter it seems to me that a demonstration that the probabilities are in favour of the appeal being allowed should normally be sufficient for the court to exercise its discretion to order a stay pending appeal.* (emphasis added).

In *Lee Kuan Yew v. Jeyaretnam JB* [1990] 1 LNS 78, *the defendant's application for a stay was not allowed because the judgment in which the defendant was attempting to stay was a judgment after a full trial where all the witnesses evidence have been heard to the fullest. Here, before me by comparison, summary judgment was obtained by the plaintiff without the benefit of hearing the defendants' evidence.* (emphasis added).

See Teow Guan (supra) favours the principle of nugatory approach. Briefly put, it means that if the stay is not allowed then the defendants' appeal would be rendered redundant. That was indeed the stand of the defendants that their appeal to the Court of Appeal would be rendered nugatory if their application for a stay was not allowed. It was urged upon me to allow the defendants' application for a stay as seen in encl. 17. (emphasis added).

Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram (No. 2) (supra) was a *case relating to contempt and there the court refused the application for a stay by the defendant because no reason was given for the delay and the defendant too failed to purge the contempt before making the application for a stay. Here, the facts are different by comparison. The defendants filed a formal application for a stay as reflected in encl. 17 supported by an affidavit.* Here, the issue of contempt has no relevance at all. (emphasis added).

The emphasis of the nugatory test for determining the stay is not that the appeal would be successful. Rather, a stay is to be granted only if it can be shown that the appeal would be rendered nugatory if it would deprive the defendant the result of the appeal.

In *Credit Lyonnais v. SK Global Hong Kong Ltd* [2003] HKEC 963, the Court of Appeal said:

> … *the court retains an inherent jurisdiction in suitable cases, to make orders staying execution* quite apart from those situation expressly permitted under the Rules of the High Court (namely RHC O. 45, r. 11, O. 47, r. 1 and O. 59 r. 13). By the term 'suitable cases' are meant those situations in which the inherent jurisdiction of the court is required to be exercised so as to avoid injustice, prevent abuse, preserve the dignity of the court or to facilitate the administration of justice. (emphasis added).
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> The existence of an inherent jurisdiction to stay of execution must not, however, be confused with the exercise of it. The exercise of discretion whether or nor to order a stay of execution must be made in accordance with principle. In various part of her judgment, Chu J referred to the 'balance of convenience'. In my view, this was not the appropriate test. While it would not be right to set out an exhaustive list of relevant factors for the exercise of the inherent jurisdiction in this context, it is important to bear in mind that the jurisdiction will only be activated where an injustice be caused, to prevent abuse, to preserve the dignity of the court or to facilitate the administration of justice.

[10] There is also another factor which this court cannot shut its eyes ie, exh. KLK6 attached to the defendant's affidavit (encl. 23) where it is shown that the plaintiff himself had previously claimed and represented to the defendant in the Petition for Divorce No. 33-452-2003 the said property as a matrimonial property, by claiming for division between them of the said property under the Law Reform Marriage and Divorce Act 1976 which rightfully would allow the defendant to claim an interest in the said property whereby giving her the right to occupy the said property. (See *Madell v. Thomas & Co* [1891] 1 QB 230). As this court had repeatedly stated and is mindful that it would not dwell on the merits of the appeal even though and arguably the defendant may have shown some prospect of success. As the application (encl. 22) is only for stay of execution which required the defendant to demonstrate special circumstances and which includes the principles of nugatory approach, this court would only confine its decision to the requirement of special circumstances which includes the principles of nugatory approach. In other words, merit by itself is not a decisive consideration for an application to stay the execution but it can be considered together with special circumstances which necessarily includes the principles of nugatory approach as in the instant case. (See *MCAT Gen Sdn Bhd v. Celcom (M) Bhd* [2007] 8 MLJ 107 at p. 111-112; 113).

[11] There is also one other important factor to be considered which this court finds is relevant, that is, the appeal is not frivolous or vexatious but instead, it contains arguably some prospect of success and it involves the interpretation of various statutory provisions and the construction of the trust deed dated 5 May 1999 which requires an authoritative decision by the Court of Appeal. Therefore, to refuse the application for stay of execution pending the appeal at this stage would 'inflict greater hardship to the defendant' than to the plaintiff. In addition, this court finds that there are also exceptional circumstances which justify a stay and which are as follows:

(a) First, the decision of the High Court is not after a full trial by *viva voice* evidence but was based on affidavit evidence and documents.

(b) Secondly, the decision of the court in the originating summons (encl. 1) in the instant case, as stated above, was based on affidavit evidence and not after a full trial. The general rule or practice of the court where stay of execution is sought pursuant to a judgment based on affidavit evidence and not after a full trial, has been to grant the stay of execution of the judgment pending the appeal or the outcome of the appeal as 'the defendant would be irremediably injured' if the judgment is executed especially in the event, the defendant succeeds in the appeal; (See *Hong Leong Finance Bhd v. Hon Hoi Weng* [1987] 2 MLJ 377 at p. 379), *Yun Hing (Sabah) Sdn Bhd v. Sandakan Plywood & Veneers Co. Sdn Bhd* [1995] 1 MLJ 339);

(c) Thirdly, the appeal by the defendant to the Court of Appeal against the decision of the High Court is a matter of right where no leave of the Court of Appeal is necessary or required;

(d) Fourthly, the decision of the High Court, Ipoh which has ordered the defendant to deliver vacant possession of the said property to the plaintiff is the subject matter of the appeal and relates to the enforcement of the judgment;

(e) Fifthly, the plaintiff is a foreigner, being an Australian, who was married to the defendant and is now divorced. There is a high probability that the plaintiff would dispose of the said property and reside permanently in Australia and this cannot

be ruled out. In such an event, the appeal if successful would be rendered nugatory. (See *Wilson v. Church (No. 2)* [1879] 12 Ch. D 454; *Re Khong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No. 2)* [1976] 1 MLJ 131);

(f) Sixthly, the plaintiff had obtained a decree of divorce from the defendant which was granted by the High Court Ipoh *vide* Divorce Petition No: 33-452-2003 on 13 January 2004 where the plaintiff himself had claimed in the petition for divorce, division of the said property between himself and the defendant but had later withdrawn this claim with liberty to file a fresh claim;

(g) Seventhly, there is a child aged nine years born to the parties and the child lives with the defendant in the said property which the plaintiff himself had previously represented in the said divorce petition to be the matrimonial property;

(h) Eighthly, as the appeal which was filed by the defendant to the Court of Appeal was as a matter of right and is not frivolous or vexatious; this court would always consider the subject matter of the appeal so as not to render the appeal if successful nugatory. In other words, as a general rule, the court will exercise its judicial discretion in such a way so as to prevent the appeal, if successful, from being nugatory or to frustrate the defendant from obtaining the fruits of the judgment of the appeal which would be a ground to justify the *status quo* to be maintained;

(i) Ninthly, in the instant case, the appeal is against the whole of the decision of the High Court which clearly has and involves the interpretation of several statutory provisions which the defendant has claimed has been breached by the plaintiff. Further, another factor to be considered is, whether the subject matter of the property which the plaintiff had previously represented to be a matrimonial home where the beneficial interest of the defendant in the said property, would be at risk, if the defendant succeeds in the appeal, and if the stay is not granted;

(j) Tenthly, the subject matter of the property is immoveable and not monetary and the principle of nugatory approach is a relevant factor to be taken into account;

(k) Eleventh, there is a likelihood of the defendant encountering great difficulty in obtaining back the said property if the same is transferred or disposed of, alternatively, the difficulty in obtaining the value of the property by way of damages as the plaintiff being a foreigner may not have sufficient funds or assets in this jurisdiction to recover in lieu of the said property;

(l) Twelve, there is no allegation that the appeal which was filed by the defendant was not *bona fide* or is for a collateral purpose.

[12] In the circumstances, this court finds that there are exceptional or special circumstances in the instant case where the scale of justice tilts in favour of granting the stay when considering the special circumstances coupled with the principles of nugatory approach which relates to the enforcement of the judgment as found by this court.

[13] On the particular set of facts, background and circumstances, it is best and in the interest of justice to maintain the *status quo* pending the appeal. In *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126, Abdul Hamid J (as he then was) at p. 127 said:

> On the question of stay of execution it is I think settled law that the granting of such a stay is a matter of the Court's discretion, and it is true that the exercise of such discretion must be founded upon established judicial principles. *One of the determining factors that calls for consideration is whether by not making an order to stay of the execution it would make the appeal if successful, nugatory in that it would deprive an appellant of the results of the appeal.* How pertinent that factor would be may vary according to the circumstances of each particular case. (emphasis added).

[14] Be that as it may, there is also another important factor to be considered ie, pursuant to the order dated 5 August 2003, in Originating Summons No. 24-168-03, a copy of which is attached to the defendant's affidavit (encl. 23) and in the defendant's affidavit tambahan (encl. 43) and marked as (exh. MSR1), the court had on the application of the defendant and by consent ordered the plaintiff to be restrained or injuncted from entering into the said property until further order and this order still remains intact and has not been varied or set aside. This court is

of the considered view that the order in the instant case which had granted vacant possession to the plaintiff in the Originating Summons No: 24-2098-2004 and which is the subject matter of the appeal to the Court of Appeal had not varied in any way or set aside the prohibitory injunction granted by consent in Originating Summons No: 24-168-03 on 5 August 2003. The said prohibitory injunction granted on 5 August 2003 in Originating Summons No: 24-168-03 and obtained by the defendant still remains intact. In any event, any order which had granted vacant possession to the plaintiff cannot be taken or accepted as having varied the said prohibitory injunction, as in the considered view of this court, it cannot be done by an order in another proceeding ie, in this Originating Summons No: 24-2098-04 unless the variation or setting aside of the said consent order is made in the same Originating Summons No: 24-168-03 or by a fresh action if the situation so warrants.

[15] As stated above, this court finds that the balance of convenience or justice of the case when considering the subject matter of the judgment and the totality of the facts and circumstances in the instant case, tilts in favour of granting the stay. By seeking a stay of execution pending the appeal, the defendant is not depriving the plaintiff of the judgment which was given in his favour as the stay if granted, would also not alter the position of the plaintiff to his detriment. On the contrary, the facts and circumstances of this case shows that if the stay of execution is not granted and the judgment is allowed to be enforced, it will be detrimental to the defendant and will cause irreparable damage to the defendant which will be far greater than any damage which the plaintiff might suffer, if the stay is granted as refusal of the stay render the appeal nugatory and would destroy the substratum of the appeal in the event the defendant succeeds in the appeal to the Court of Appeal.

[16] This court is of the respectful view that the totality of the facts and circumstances and on considering the previous relationship between the defendant and the plaintiff and the previous claim by the plaintiff for the division of the said property as a matrimonial property when taken cumulatively can constitute special circumstances coupled with the principles of nugatory approach which is related to the enforcement of the judgment. Further, as stated above, the order of the High Court dated 19 November 2004 in Divorce Petition No: 33-452-03 (exh.

BM1) as attached to the afidavit jawapan of the plaintiff (encl. 24) where there was a claim by the plaintiff under the notice of application for ancillary relief in the petition for the Petition No. 33-452-2003 (exh. KLK6) shows that the plaintiff himself had claimed for the following:

> that the property known as No. 113, Jalan Chow Kai, Canning Garden, 31400 Ipoh, Perak and held under HS(D)KA 1553/83 PT 46841 in the Mukim of Hulu Kinta, District of Kinta, Perak together with a single storey bungalow house erected thereon be divided between the Petitioner and the Respondent in such proportion as the Court thinks reasonable and that the Respondent be directed to do all such things as may be necessary to give effect to the order. (emphasis added).

[17] On the other hand, this court finds that the withdrawal of the claim for division of the said property by the plaintiff as contained in the notice of the application for the ancillary relief with liberty to claim against the defendant by a civil action did not expressly make it clear at the time whether the intended claim by a civil action was to claim a share or portion or the whole or distribution as claimed previously of the said property. Further, by the order of the court dated 19 November 2004 exh. BM1 attached to the afidavit jawapan of the plaintiff (encl. 24), there was also no mention of the defendant holding the said property in trust for the plaintiff nor is there a trust caveat which the plaintiff had subsequently claimed in this Originating Summons No: 24-2098-04 or which is the subject matter of this application and the appeal to the Court of Appeal.

[18] In the circumstances and in accordance with reason and justice, this court is of the considered view that the application for stay ought to be granted to the defendant pending the outcome of the appeal to the Court of Appeal. Accordingly, the application for stay (encl. 22) prayers 1 and 2 is allowed. However, in the meantime, the defendant is ordered to pay a nominal rental for the said property to the plaintiff in the sum of RM300 per month commencing from the date of this order. The said rental payment is ordered to be paid into the account of the plaintiff's solicitors to be kept in the client's account until the outcome of the appeal to the Court of Appeal or until such further order by this court on the status of the monies paid by the defendant. Each party is ordered to bear its own costs.